

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

77-6020

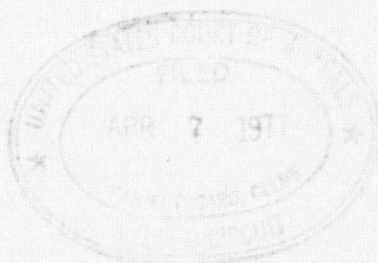
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WITH PROOF
OF SERVICE

To Be Argued By
DANIEL F. COHALAN

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT



ROBERT WILLIAM ALTIMUS,

Plaintiff-Appellant,

-against-

MANHOOD FOUNDATION, INC., ROBERT ROBINSON, SOCIETY OF ST. VINCENT de PAUL, JOSEPH M. FITZPATRICK, VIRGINIA RUSSELL, H.F.J. CONSTRUCTION COMPANY, HAROLD M. STEWART, ELLIOT RICHARDSON, Personally and in his capacity as Attorney-General of the United States, MAURICE H. SIGLER, Personally and in his capacity as Chairman of the United States Board of Parole, GERALD E. MURCH, WILLIAM T. WOODWARD, JR., GEORGE J. REED, WILLIAM E. AMOS, PAULA A. TENNANT, CURTIS C. CRAWFORD, Personally and in their capacities as members of the United States Board of Parole, NORMAN A. CARLSON, Personally, and in his capacity as the Director of the United States Bureau of Prisons, RALPH L. AARON, Personally and in his capacity as the Warden of the Federal Correctional Institution at Sandstone, Minnesota,

Defendants-Appellees.

Appeal From The U.S. District Court For The
Southern District of New York

BRIEF OF DEFENDANTS-APPELLEES

Dated: New York, New York
March 31, 1977

GAREY & GAREY
Attorneys for Defendants-Appellees,
Society of St. Vincent de Paul,
Joseph M. Fitzpatrick and
Virginia Russell
Office and P. O. Address
342 Madison Avenue
New York, New York 10017
(212) 697-8500

(6236)

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Table of Authorities

Counsel for Appellees, Society of St. Vincent de Paul, Joseph M. Fitzpatrick and Virginia Russell, is not citing any authorities in this brief but is relying completely on the opinion of the Court below. (Lasker, D. J.). See Appendix attached to appellant's brief pages A-1 et seq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROBERT WILLIAM ALTIMUS,

Plaintiff-Appellant,

-against-

MANHOOD FOUNDATION, INC., et al. ["Private Defendants"]
and Elliot Richardson, et al. ["Federal Defendants"],

Defendants-Appellees.

(Docket No. 77-6020)

BRIEF OF DEFENDANTS-APPELLEES
SOCIETY OF ST. VINCENT DE PAUL,
JOSEPH M. FITZPATRICK AND VIRGINIA RUSSELL

STATEMENT

This appeal is taken by plaintiff, Robert William Altimus ("Mr. Altimus") from an order of the United States District Court for the Southern District of New York, Morris E. Lasker, Judge, dated December 21, 1976, granting motions by the so-called Federal Defendants and by the so-called Private Defendants to dismiss the Complaint against them.

This brief is addressed to the Court on behalf of The Society of St. Vincent de Paul, a charitable religious organization, and two of its employees, Joseph M. Fitzpatrick ("Mr. Fitzpatrick") and Virginia Russell ("Mrs. Russell"). A separate brief is being submitted on behalf of "private" defendants, Manhood Foundation, Inc., and its employee, Robert Johnson ("Mr. Johnson").

The action was instituted in 1973 by Robert William Altimus, a federal prisoner confined in the Federal Correctional Institution at Sandstone, Minnesota, seeking injunctive and declaratory relief and damages against members of the United States Board of Parole and the Federal Bureau of Prisons claiming that his application for parole was wrongfully denied without adequate procedural protections. He also included as defendants and seeks damages from Manhood Foundation, Inc., the Society of St. Vincent de Paul, H. F. J. Construction Company, and individuals connected with these organizations, claiming that they gave him false assurances inadequate to satisfy the requirements of a parole plan, knew the proposed parole plan was inadequate and acted "wilfully and deliberately" to "prevent plaintiff from securing an effective parole plan."

Prior to answering the complaint, the private defendants in November, 1973, moved to dismiss for lack of jurisdiction and for failure to state a claim. Their motions were denied

on January 28, 1974, without prejudice to renewal thereof after a discovery was had. Thereafter, they served answers denying the allegations of the complaint and putting the same at issue.

In April, 1975, the private defendants renewed their motions to dismiss. These motions were granted by Judge Lasker on December 21, 1976.. His decision and order is the subject of the present appeal.

THE FACTS

Plaintiff, while a prisoner in the Federal Correctional Institution in Sandstone, Minnesota, addressed a letter on March 3, 1972, to the Society of St. Vincent de Paul in New York asking for assistance in obtaining parole and specifically stating that he needed a parole advisor, a job and a place to live in New York City. The Society referred him to defendant Manhood Foundation, whose head counsellor found him a job and agreed to act as his parole advisor. The necessary employer and advisor forms were filled out and sent to Sandstone where, according to plaintiff-appellant's brief (see page 5 thereof), they were confirmed as accurate by one Vern Erickson, plaintiff's caseworker at the Institution. The Society also agreed to help plaintiff to obtain suitable housing in New York (see appellant's brief-Page 4).

Mr. Altimus subsequently filed a formal application for Release on Parole which was brought up for hearing in August, 1972. His application was heard and denied, and his sentence was ordered to "continue to termination." Despite numerous efforts to discover why he had been denied parole, he never was able to get any explanation or reasons, and this remained the case even after he fashioned a "new" parole plan under the sponsorship of the Rochester Junior Chamber of Commerce.

So Mr. Altimus, while still a prisoner, brought this suit against the officials of the Board of Parole and the prison officials claiming that by their actions in refusing him parole they had denied him his constitutional rights. But he also named as defendants the Society of St. Vincent de Paul and its employees Fitzpatrick and Russell, the Manhood Foundation and its employee Robinson, and the H.F.J. Construction Company and its president Harold M. Stewart since, according to plaintiff-appellant's brief (see page 8 thereof), "he believed that the Private Defendants must have assembled a deficient parole plan."

PLAINTIFF HAS NOT ASSERTED
A CAUSE OF ACTION AGAINST
THE PRIVATE DEFENDANTS.

It is understandable, perhaps, that plaintiff, injured as he claimed to be by the denial of his application and frustrated at every turn by his failure to elicit the reasons why parole was

denied to him, would seek redress from anyone and everyone who was connected with the parole application in any way. And this of course is what he did. Acting as his own attorney, he drew up a complaint which "bunched" together everyone who was involved, the Parole Officials, the private organizations and individuals. It was this document which was served upon the parties and which impelled these defendants, when advised that plaintiff was seeking the appointment of counsel to represent him, to request the Court to appoint an attorney to represent Mr. Altimus in the litigation so that the pleadings therein could be properly formulated and the issues clarified. The Court subsequently appointed Nicholas A. Robinson, Esq., to represent Mr. Altimus. Mr. Robinson thereafter prepared an amended complaint on Mr. Altimus' behalf and caused it to be served on all parties. It is this amended complaint that was dismissed by Judge Lasker on December 21, 1976.

The thrust of plaintiff's complaint against the Private Defendants is found in the first cause of action set out in the Amended pleading. There plaintiff alleges that he corresponded and talked on the telephone with Mrs. Russell, Fitzpatrick and Robinson in an attempt to arrange satisfactory employment, that Mrs. Russell and Fitzpatrick made contact with Robinson of Manhood on behalf of plaintiff, that Robinson contacted Stewart of H.F.J. Construction Co. to secure a job, that Robinson agreed to act as parole advisor, that a document was submitted to the

Federal Correction Officials at Sandstone on a U.S. Parole Board form entitled "Statement of Employer, Statement of Parole Advisor" assuring that upon release the H.F.J. Construction Company would provide plaintiff with a job at \$7.10 per hour, and that Robinson signed a statement agreeing to serve as plaintiff's parole advisor. Plaintiff also alleges that he was assured that the Society of St. Vincent de Paul would find him a place to live in New York City. There then follows the conclusory allegation that (1) the assurances given by the New York defendants were false and inadequate to satisfy the requirements for the parole plan, and (2) the New York defendants, individually and collectively, knew that the parole plan proposed was inadequate and acted deliberately and wilfully to prevent plaintiff from securing an effective parole plan in violation of the laws of the State of New York and in violation of plaintiff's civil rights.

Nowhere in the pleading, however, has plaintiff alleged any facts to support these conclusions. In reality, there are no such facts, so his failure to allege them is understandable. Counsel for the plaintiff-appellant virtually admits this when he states on page 8 of his brief

"Mr. Altimus also proceeded against the Society and its employees Fitzpatrick and Russell, the Manhood Foundation and Robinson, and H.F.J. Construction Company and its President Harold M. Stewart ("Private

Defendants") since he believed that the Private Defendants must have assembled a deficient parole plan." (Underscoring mine)

It was not any facts that Mr. Altimus had which impelled him to bring action against the private defendants. It was his belief that since his parole application was denied, they must have been at fault in some way. The answer most ready to hand was that they "must have assembled a deficient parole plan." But the things they arranged for him and did for him were exactly the things he had asked them to do when he wrote to the Society of St. Vincent de Paul in March, 1972. Mr. Altimus admits this in his affidavit of February 18, 1974, submitted in support of his motion for summary judgment. In paragraphs 5 to 18 of this affidavit he tells in detail the story of his dealings with the Society and the other private defendants, and of their efforts on his behalf. He concludes in paragraph 13 of the affidavit by stating

"13. I truly believed that all preparations had been thoroughly and competently made for my parole application and that through the Archdiocesan Central Council, the Manhood Foundation and Robinson, and the H.F.J. Construction Company I had a plan which would be acceptable to the U.S. Board of Parole."

What Mr. Altimus evidently did not take into consideration was the fact that in order to secure parole perhaps more is sometimes required than an acceptable parole plan. And when one is denied parole, it takes more than mere assertion to prove that the denial was due to an inadequate or defective plan.

Judge Lasker in his decision notes that the private defendants never gave plaintiff an assurance that the parole plan would be adequate. Nor did the plaintiff inform the Court in what way the plan was in fact inadequate. Actually, the opinion points out that the plaintiff has never set forth the legal theory under which he seeks to hold these private defendants liable for his parole denial. There cannot be a valid breath of contract claim in a situation where there was no contractual relationship and no claim of consideration given for defendants' services. There cannot be a valid claim in tort where no facts are given proving an intentional or negligent preparation of a parole plan which defendants knew to be inadequate and which caused the Board to deny parole. In sum, the Court determined that the elements of a cause of action against the private defendants under state law simply do not exist--and that the motion to dismiss should be granted.

These private defendants played the role of "Good Samaritan" when the plaintiff appealed to them to assist him in his trouble. They came to his aid when he requested it; they asked nothing

except to be of assistance to him. They had no motive other than to help. They sought no reward. Certainly, they never anticipated being subjected to this law suit in return for their efforts on his behalf.

CONCLUSION

The order dismissing this complaint should be affirmed.

Dated: New York, New York
March 31, 1977

Respectfully submitted,

Garey & Garey
Attorneys for Defendants-
Appellees, Society of St.
Vincent de Paul, Joseph M.
Fitzpatrick and Virginia
Russell
Office and P. O. Address
342 Madison Avenue
New York, New York 10017
(212) 697-8500

Of Counsel:

Daniel F. Cohalan, Esq.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Henry KAPLAN, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 44-10 Ketcham St.
ELMHURST, N.Y.

That on the 7 day of April, 1977,
deponent personally served the within BRIEF OF DEFENDANTS-APPELLEES

upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed~~
~~in a postpaid properly addressed wrapper, in the post office~~
~~or official depository under the exclusive care and custody~~
~~of the United States post office department within the State~~
~~of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

NICHOLAS A. ROBINSON, ESQ.
BRATTER, GREENE, ALLISON & TUCKER
Attorney for Robert William Altimus, Plaintiff-Appellant
430 Park Ave.
New York, N. Y. 10022

PIERCE PALEY, P.C.
Attorney for Appellees
Manhood Foundation, Inc. and
Robert Robinson
711 Third Ave.
New York, N. Y. 10017

Henry Kaplan

Sworn to before me this

7th day of APRIL, 19

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss .

Kenneth E. Kennedy, being duly sworn,
deposes and says that deponent is not a party to the action,
is over 18 years of age and resides at 1171 Steeple Pt.
Bklyn N.Y. 11213.

That on the 7 day of April, 1977,
deponent personally served the within BRIEF FOR
DEFENDANTS - APPELLEE
upon the attorneys designated below who represent the
indicated parties in this action and at the addresses below
stated which are those that have been designated by said
attorneys for that purpose.

By leaving 2 true copies of same with a duly
authorized person at their designated office.

~~By depositing true copies of same enclosed
in a postpaid properly addressed wrapper, in the post office
or official depository under the exclusive care and custody
of the United States post office department within the State
of New York.~~

Names of attorneys served, together with the names
of the clients represented and the attorneys' designated
addresses.

ROBERT B. FISKE, JR., ESQ.,
U.S. ATTORNEY - SOUTHERN DISTRICT OF NEW YORK
ATTORNEY FOR DEFENDANT - APPELLEE
ONE ST. ANDREWS PLAZA
NEW YORK, N.Y.

Sworn to before me this

7th day of April, 1977
Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0930908
Qualified in Queens County
Commission Expires March 30, 1979